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SUPREME COURT, U.S.
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No. 09-770

IN THE

Supreme Court of the United States

THE BOSTON TEACHERS UNION, LOCAL 66, ET AL.,

Petitioner,

v.

COMMONWEALTH EMPLOYMENT RELATIONS BOARD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME JUDICIAL COURT FOR
THE COMMONWEALTH OF MASSACHUSETTS

BRIEF FOR RESPONDENT COMMONWEALTH EMPLOYMENT RELATIONS BOARD IN RESPONSE TO PETITION FOR CERTIORARI AND SEEKING AN ORDER TO GRANT, VACATE AND REMAND

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SUMMARY OF THE ARGUMENT

Justice Frankfurter once commented that "Wisdom too often never comes, and so one ought not to reject it merely because it comes late." *Henslee v. Union Planters National Bank & Trust Co.*, 335 U.S. 595, 600 (1949) (Frankfurter, J., dissenting). After significant deliberations, the Respondent, Commonwealth Employment Relations Board ("CERB"), the agency statutorily charged with interpreting and applying the Commonwealth's public sector labor relations statute, respectfully requests that the Court grant the Petitioner's request for certiorari, vacate the Massachusetts lower court decisions and remand the matter for further consideration by the CERB. An order granting certiorari, vacating the decision and remanding the case ("GVR") is proper here because the predecessor agency of the CERB, the former Labor Relations Commission ("LRC"), erred by overturning twenty-five years of established precedent that required an actual strike vote by union members as a prerequisite for a finding that a strike in violation of M.G.L. c. 150E, § 9A(a) was occurring or was about to occur. The LRC's imprudent reversal of that long-standing rule gave rise to the Petitioner's First Amendment claim in the petition now before this Court. Accordingly, a GVR order is appropriate to allow the CERB to fulfill its duties as the state agency statutorily designated to interpret and apply the Commonwealth's labor relations law and reassert a long-standing policy that avoids a need for constitutional review of a key provision of Massachusetts labor relations law, M.G.L. c. 150E, *et seq*.

ARGUMENT

A. Standard for Issuing GVR Orders.

"An administrative agency is not disqualified from changing its mind; and when it does, the courts still sit in review of the administrative decision and should not approach the statutory construction issue *de novo* and without regard to the administrative understanding of the statutes." *National Labor Relations Board v. Local Union No. 103, Int'l Assn. of Bridge, Structural & Ornamental Iron Workers, AFL-CIO*, 434 U.S. 335, 351 (1978). In those rare but important circumstances where a government agency does admit error, the federal courts have afforded the administrative agency an opportunity to re-examine an incorrect statutory or regulatory standard it is charged with interpreting or implementing. *See, e.g., Lawrence v. Chater*, 516 U.S. 163, 165-67 (1996) (granting the Solicitor General's request for GVR based on a new statutory interpretation taken by the Social Security Administration) (and cases cited therein); *SFK USA, Inc. v. United States*, 254 F.3d 1022, 1025 (Fed. Cir. 2001) (explaining a court's obligation to remand a case to an agency based on an "agency's change in policy or statutory interpretation."); Aaron-Andrew P. Bruhl, *The Supreme Court's Controversial GVRs – An Alternative*, 107 Mich. Law. Rev. 711, 732-34 (2009) (charting GVRs granted by the Court that stem from confessions of error by the U.S. Solicitor General and state equivalents since 1975).

A request that this Court issue a GVR order based on an agency's admission of error is considered in light of the deference afforded administrative agency decisions under *Chevron, U.S.A., Inc. v.*

Natural Resources Defense Council, Inc., 467 U.S. 837, 843 (1984), and deemed proper in either of two scenarios. A reviewing court maintains considerable discretion and can either remand or decide the statutory issue when an agency is either compelled or forbidden by the governing statute to reach a different result. *SFK USA*, 254 F.3d at 1029 (applying a step-one *Chevron* issue standard allowing remand to conserve judicial resources or because agency viewpoint may be useful before judicial review). However, absent a step-one *Chevron* issue, "remand to the agency is required, absent the most unusual circumstances verging on bad faith" since governmental agencies are entitled to formulate policy and make rules "to fill any gap left, implicitly or explicitly, by Congress." *Id.* at 1029-30 (quoting *Chevron*, 467 U.S. at 843) (further citations omitted). Under *Chevron*, an agency must be allowed to assess "the wisdom of its policy on a continuing basis," *Chevron,* 467 U.S. at 864, and this discretion to reconsider policies does not come to an end even after agency action is appealed. *See Auer v. Robbins*, 519 U.S. 452, 462-63 (1997) (deferring to agency's interpretation of its own regulation advanced in litigation).

Accordingly, in *Lawrence,* this Court explained that "a new interpretation of a statute adopted by the agency charged with implementing it may be entitled to deference in the context of litigation to which the Government is a party." 516 U.S. at 171. *Lawrence* thus utilized GVR, applying "deference under the rule of *Chevron*," *id.* at 172, when the Social Security Administration changed its interpretation of its statute during the course of litigation. *Id.* at 164. More recently, the Federal Circuit Court of Appeals applied these principles in

SFK USA, where the Department of Commerce reversed its position in a case on appeal to the Court of International Trade and requested that the case be remanded back to the agency. 254 F.3d at 1026. The Court of International Trade refused to rely on the Department of Commerce's changed position and upheld the Department's initial administrative action. *Id.* at 1026-27. On further review, the Federal Circuit Court of Appeals overturned the Court of International Trade and upheld the Department's right to reconsider its position, finding that remand to the agency was appropriate because the issue on which the Department had changed its position was within the agency's discretion, and that there was no evidence that its new position was taken in bad faith. *Id.* at 1030.

In sum, "[i]f it appears reasonably probable that a confession of error reveals a genuine and potentially determinative error by the court below, a GVR may be appropriate; similarly, we believe that if an agency interpretation is reasonably probably entitled to deference and potentially determinative, we may GVR in light of it." 516 U.S. at 172. In other words, under *Lawrence,* "[i]t is precisely because of uncertainty that" this Court issues a GVR order. *Id.*

B. A GVR Order is Appropriate in This Case Because the CERB Has Admitted That the Former Labor Relations Commission Committed a Determinative Error When it Overruled Twenty-Five Years of Precedent Governing the Administration of the Commonwealth's Ban on Public Sector Strikes.

For twenty-five years, the CERB's predecessor, the former Labor Relations Commission,[1] consistently held that a violation of the prohibition on strikes set forth in M.G.L. c. 150E, § 9A(a)[2] is limited to "situations where the evidence

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[1] Pursuant to St. 2007, c. 145, §§ 5, 7, and 8, effective November 14, 2007, the Commonwealth Employment Relations Board is the successor agency to the Labor Relations Commission for, among other things, the purposes of defending appeals from agency final orders. The events at issue here occurred before the effective date of this law. Since the Board now stands in the shoes of the former Commission for cases arising prior to the reorganization statute, references to the Board are intended to include the former Labor Relations Commission.

[2] In its entirety, § 9A reads as follows:

> (a) No public employee or employee organization shall engage in a strike, and no public employee or employee organization shall induce, encourage or condone any strike, work stoppage, slowdown or withholding of services by such public employees.
>
> (b) Whenever a strike occurs or is about to occur, the employer shall petition the commission to make an investigation. If, after investigation, the commission determines that any provision of paragraph (a) of this section has been or is about to be violated, it shall

indicates that there is no further union action ... necessary before the strike will begin." *City of Worcester and Worcester Vocational Teachers Assn.*, 13 MLC 1627 (1987) (citing *Boston School Committee*, 10 MLC 1289, 1290 (1983), *Boston School Committee*, Case No. SI-189 (Sept. 10, 1986) and *Boston School Committee*, Case No. SI-140 (Sept. 10, 1981)); *see also Boston School Committee*, 27 MLC 32, 34, 2000 WL 35733304 (2000) (dismissing a strike petition because "a strike vote has not yet occurred"); *accord, Brockton School Committee*, 20 MLC 1253, 1258 (1993). This longstanding rule was premised on the view that it was speculative, and therefore improper, to issue an order prohibiting a strike when some further action must be taken by the union membership before a strike can occur. *City of Worcester*, 13 MLC at 1629.

Thus, since at least 1981, this agency "declined to issue orders prohibiting strike activity where, despite the Union leadership's recommendation, the membership had not yet voted to engage in a work stoppage. Declining to speculate upon the outcome of the pending strike vote, the Commission concluded in those cases that no strike was yet imminent." *City of Worcester*, 13 MLC at 1629; *Boston School Committee*, 10 MLC 1290 (dismissing the strike petition as speculative because the strike vote was merely scheduled and finding it

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> immediately set requirements that must be complied with, including, but not limited to, instituting appropriate proceedings in the superior court for the county wherein such violation has occurred or is about to occur for enforcement of such requirements.

M.G.L. c. 150E, § 9A.

"equally plausible that the general membership either will not vote on the question or will vote against any unlawful job action."). This rule has been upheld by state and federal courts. *Boston Teachers Union, Local 66, AFT, AFL-CIO v. Edgar*, 787 F.2d 12, 17 & n.5 (1st Cir. 1986) (noting that "[t]he Commission has determined on other occasions that a strike is deemed 'about to occur' only when the Union membership actually votes to strike."); *Lenox Education Association v. Labor Relations Commission*, 393 Mass. 276, 285-86, 471 N.E.2d 81, 87-88 (1984) (recognizing that a certain amount of delay is inevitable under the strike petition procedure thereby not precluding an employer from engaging in self-help until it has petitioned for a strike investigation and the CERB has set forth its requirements) (citing *Utility Workers of America, Local 466 v. Labor Relations Commission*, 389 Mass. 500, 451 N.E.2d 124 (1983)).

That long-standing precedent appropriately balanced the statutory rights of employees and employers, fulfilled the purposes of M.G.L. c. 150E, and successfully avoided constitutional challenges. In *Utility Workers of America, Local 466 v. Labor Relations Commission*, 389 Mass. 500, 504-05, 451 N.E.2d 124, 127 (1983), the Massachusetts Supreme Judicial Court upheld the agency's interpretation of G.L. c. 150E, § 9A(a) under a *Chevron*-like deference standard. The court extended deference to the agency's own interpretation of its statutory obligation to grapple with the challenges posed by the inevitability of delay that occurs when administering the statute's strike petition procedures. In *Boston Teachers Union*, 787 F.2d at 18-19, the First Circuit Court of Appeals also recognized and implicitly approved of the agency's

balancing of statutory mandates and constitutional rights when it denied a union's constitutional challenge to the agency's interpretation and application of § 9A. In that case, the Union argued that even the specter of agency intervention whenever a strike is "about to occur" would chill protected speech. *Id.* The federal court dismissed the Union's First Amendment claim and explained that "given the Commission's policy not to issue an order against the Union until its membership *votes* to strike, we see little likelihood that the mere discussion of striking by the membership will provoke Commission action. Past events show that Union members have not, in fact, been deterred from considering, discussing, or even voting upon a strike." *Id.* (emphasis in original). The First Circuit's approval of the LRC's well-established policy balancing the state's interest in enforcing the ban on strikes with employees' constitutional rights supports the CERB's request for GVR premised on judicial deference to an agency's longstanding interpretation of a statute it is charged with administering.

It was not until this case, when the former LRC erroneously reversed this long-standing agency precedent, that a constitutional issue arose where there had been none. Specifically, the decision erroneously found a violation of § 9A(a) even though the factual record plainly indicated that the union membership had yet to convene a meeting to discuss and vote on whether or not they should authorize an unlawful strike. By taking action to prevent the union meeting from occurring, the former LRC explicitly reversed longstanding agency precedent interpreting and applying § 9A: "To the extent our decision here conflicts with prior Commission

decisions that require an affirmative strike vote as a prerequisite to a finding that a strike violative of Section 9A either was occurring or was about to occur, *the prior decisions are overruled*." Petitioner's Appendix at 20a (emphasis added).

The former LRC's departure from well-reasoned precedent was unwarranted. The longstanding agency interpretation of § 9A - rejected by the former LRC - had avoided the constitutional confrontation raised in the Union's petition for certiorari by properly balancing § 9A(a)'s clear prohibition of strikes with employees' constitutional right to meet and discuss whether to strike. Courts have repeatedly recognized *Chevron*-like deference to the CERB's interpretation of Chapter 150E, including its interpretation of § 9A(a). *Utility Workers of America, Local 466*, 348 Mass. at 504-05, 451 N.E.2d at 127; *see also City of Boston v. Commonwealth Employment Relations Board*, 453 Mass. 389, 395, 902 N.E.2d 410, 415 (2009) (according "deference to the commission's specialized knowledge and expertise, and to its interpretation of the applicable statutory provisions" and setting aside the agency's decision only if it is arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with law) (citations omitted).

An order granting GVR is warranted because the CERB explicitly rejects the former LRC's argument that the agency lacks the ability to interpret and process "about to occur" strike petitions in accordance with long-established precedent where, as in this case, the timelines for doing so are relatively short. *Cf. Lenox Education Association*, 393 Mass. at 285-86, 471 N.E.2d at 87-88 (upholding agency authority even in the face of

"the inevitability of a certain amount of delay while the commission undertook an investigation in response to a strike petition," and finding that this investigation does not compromise the right of public employers to resort to self-help when responding to illegal strike action in the public education context).

Entering a GVR order in this case is also appropriate because it would conserve scarce judicial resources. Vacating the lower court decisions and remanding the case back to the CERB would allow the CERB to reassert and apply its well-reasoned precedent that holds it would be speculative to issue an order prohibiting a strike when some further action must be taken by the union before a strike can occur. *Boston School Committee*, 27 MLC 32, 34, 2000 WL 35733304 (2000). Furthermore, an order for GVR will allow the CERB to review the evidence in light of this precedent and determine whether a violation of § 9A(a) occurred without making a ruling that would require a reviewing court to reach the constitutionality of the governing statutory scheme. *Hanover v. Housing Appeals Commission*, 363 Mass. 339, 364, 294 N.E.2d 393 (1973) (holding that the court must construe a statute, "so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score." (quoting *United States v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909)).

CONCLUSION

For all these reasons, the CERB respectfully requests that the Court grant the Petitioner's request for certiorari, vacate the Massachusetts lower court decisions and remand the matter for further consideration by the CERB.

Respectfully submitted,

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